UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN THE MATTER OF:	)	
	)	
WARREN TAM	)	CASE NO. 10-40825
	)	
	)	
Debtor	)	

DECISION

At Fort Wayne, Indiana, on September 9, 2010

As a result of the bankruptcy reforms of 2005, to be eligible for relief under Title 11, an individual must have received credit counseling from an approved agency during the 180 days prior to filing the petition. 11 U.S.C. § 109(h)(1). This requirement may be temporarily waived, however, if the debtor files "a certification," which "is satisfactory to the court," describing "exigent circumstances" necessitating the immediate filing of a bankruptcy petition without waiting for the completion of credit counseling, and which "states that the debtor requested credit counseling . . . but was unable to obtain [it]" within seven days.[1] 11 U.S.C. § 109(h)(3)(A)(i-iii). If the certification is satisfactory to the court, the debtors are required to obtain credit counseling within the 30 days following the date of the petition. 11 U.S.C. § 109(h)(3)(B).

The debtor filed a petition for relief under chapter 11 on August 17, 2010, but did not file exhibit D to the petition. In response to an order to show cause, dated August 19, 2010, the debtor filed a certification which the court construes as a request to temporarily waive the pre-petition credit counseling requirement, pursuant to 11 U.S.C. § 109(h)(3). That certification states that the debtor wanted to file the bankruptcy before Marquette Bank filed a foreclosure action and before a tax sale,

[1]This information is to be provided on exhibit D to the petition. The debtor in this case has not filed that exhibit.

scheduled for September 1, was held. It also states that he was not able to obtain credit counseling before filing because "of a lack of experience."[2]

Determining whether a debtor has made a sufficient demonstration of exigent circumstances meriting a temporary waiver or suspension of the credit counseling requirement is a matter committed to the court's discretion. In re Duncan, 418 B.R. 278, 280 (8th Cir. BAP 2009); In re Dixon, 338 B.R. 383, 387 (8th Cir. BAP 2006). "The word 'exigent' refers to something that is 'urgent' or that requires 'immediate action or aid.'" In re Catoe-Emerson, 2009 WL 47330 *1 (Bankr. D. Dist. Col. 2009). "Exigent circumstances" in this context is often taken to mean "an urgent or emergency situation that makes it necessary to file a bankruptcy case immediately because bankruptcy relief would be unavailing if the filing of the petition had to be delayed to obtain credit counseling first." In re Palacios, 2008 WL 700968 *1 (Bankr. E.D. Va. 2008). See also, In re Rodriguez, 336 B.R. 462, 471 (Bankr. D. Idaho 2005) (exigent circumstances require "something sufficiently different from or more pressing than the usual or typical motivations to file bankruptcy"); In re Anderson, 2006 WL 314539 *2 (Bankr. N.D. Iowa, 2006) ("a situation that demands unusual or immediate action"). A debtor's ignorance of the credit counseling requirement does not constitute exigent circumstances. See, In re Duplessis, 2007 WL 118945 (Bankr. D. Mass. 2007); In re Thompson, 344 B.R. 899 (Bankr. S.D. Ind. 2006), vacated on other grounds, 249 Fed. Appx. 475 (7th Cir. 2007); In re Wallace, 338 B.R. 399 (Bankr. E.D. Ark. 2006); In re Valdez, 335 B.R. 801 (Bankr. S.D. Fla. 2005); In re Talib, 335 B.R. 424 (Bankr. W.D. Mo. 2005). What does is a fact-

[2]The certification also states that the debtor has now finished the required counseling, yet the attached certificate demonstrates that he completed the post-petition financial management course required of individual debtors proceeding under chapters 7 or 13 in order to receive a discharge, see, 11 U.S.C. §§ 727(a)(11); 1328(g), not the pre-petition credit counseling required by § 109(h) for all individuals in order to be eligible for relief.

sensitive inquiry, In re Rodriguez, 336 B.R. 462, 471 (Bankr. D. Idaho 2005); In re Curington, 2005 WL 3752229 (Bankr. E.D. Tenn. 2005); it is also an objective one. In re Vian, 2007 WL 1788995 *1 (Bankr. D. Minn. 2007). Circumstances which have been found to present sufficient immediacy have involved things such as an impending foreclosure sale, which is much different from an impending action that might culminate in such a sale at a later date, see, In re Murray, 2008 WL 732730 (E.D. Va. 2008); In re Mason, 412 B.R. 1 (Bankr. D. Dist. Col. 2009); In re Gee, 332 B.R. 602 (Bankr. W.D. Mo. 2005); In re Childs, 335 B.R. 623 (Bankr. D. Md. 2005); In re Burrell, 339 B.R. 664 (Bankr. W.D. Mich. 2006), In re Cleaver, 333 B.R. 430, 435 (Bankr. S.D. Ohio, 2005), but see, In re Dixon, 338 B.R. 383 (8th Cir. BAP 2006) (debtor had ample notice of foreclosure sale and any exigent circumstances were of the debtor's own making); In re Shear, 2010 WL 3463382 (Bankr. D.N.D. 2010) (discovery that residence was being foreclosed on and sold at sheriff's sale insufficient), imminent wage garnishment, see, In re Manaland, 360 B.R. 288, 293 fn.12 (Bankr. C.D. Cal. 2007); Rodriguez, 336 B.R. 462, but see, In re Anderson, 2006 WL 314539 (Bankr. N.D. Iowa 2006) (not all wage garnishments constitute exigent circumstances), repossession of the debtor's only vehicle, see, In re Davenport, 335 B.R. 218 (Bankr. M.D. Fla. 2005, and ("arguably") the termination of utilities. In re Graham, 336 B.R. 292 (Bankr. W.D. Ken. 2006). The circumstances confronting the debtor do not rise to that level.

This case was filed on August 17, 2010. Neither the fear of a foreclosure action which had yet to be filed nor a tax sale which would not occur for nearly two weeks are the kinds of events which necessitated immediate filing. Cf., In re Reyes, 2006 WL 4488596 (Bankr. E.D. Tenn. 2006) (information regarding pending litigation did not demonstrate exigent circumstances). The debtor could have waited in order to obtain the required counseling before filing. See, Vian, 2007 WL

1788995 *1 ("waiting several days . . . would have placed the Debtor in no jeopardy whatsoever."). See also, In re LaPorta, 332 B.R. 879, 882 (Bankr. D. Minn. 2005) (filing now must allow debtor to gain some permanent benefit in the dispute). To be truly exigent, the circumstances must leave the debtor without an available alternative – between a rock and a hard place, so to speak – either file bankruptcy now or face the loss of something vital to daily life; a loss that cannot be easily undone or reversed. The debtor here faced no such loss; his circumstances do not merit a waiver of the requirement of pre-petition counseling.

Absent sufficient exigent circumstances, there is no need to address the debtor's unsuccessful efforts at getting credit counseling. Nonetheless, the court will do so because those efforts were not sufficient.

To qualify for a temporary waiver, the debtor must demonstrate not only exigent circumstances, but also that it actually attempted to get counseling, but was not able to obtain it within seven days. See e.g., In re Wilbanks, 2010 WL 2787618 (Bankr. D. Dist. Col. 2010); In re Williams, 2010 WL 2635077 (Bankr. D. Dist. Col. 2010); In re Sosa, 336 B.R. 113 (Bankr. W.D. Tex. 2005); Davenport, 335 B.R. 218, 221 (Bankr. M.D. Fla. 2005); In re Booth, 2005 WL 3434776 (Bankr. N.D. Fla. 2005); In re Talib, 335 B.R. 424 (Bankr. W.D. Mo. 2005); In re Burrell, 2006 WL 851517 *2 (Bankr. W.D. Mich. 2006); In re Wallert, 332 B.R 884 (Bankr. D. Minn. 2005). The inability to obtain counseling must be attributable to the credit counseling agency – its circumstances, its schedule, its ability to provide counseling – not the debtor's circumstances, schedule, or convenience. In re Dansby, 340 B.R. 564, 569 n.6 (Bankr. D. S.C. 2006); In re Afolabi, 343 B.R. 195, 199 (Bankr. S.D. Ind. 2006). Here, there is no indication that the debtor actually attempted to obtain the required counseling or that the failure to obtain it was attributable to the

counseling agency. The debtor has said only that his "lack of experience" made him unable to obtain it. That is not enough. Cf., In re Dillard, 2006 WL 3658485 (Bankr. M.D. Ga. 2006); In re Wallace, 338 B.R. 399 (Bankr. E.D. Ark. 2006); In re Valdez, 335 B.R. 801 (Bankr. S.D. Fla. 2005); In re Talib, 335 B.R. 424 (Bankr. W.D. Mo. 2005) (ignorance of the credit counseling requirement insufficient to qualify for a waiver of that requirement).

The debtor's "certification" is not satisfactory to the court. He has not satisfied the requirements of § 109(h), was not eligible for relief under the United States Bankruptcy Code when this case was filed and it should be dismissed. See e.g., In re Hedquist, 342 B.R. 295, 300 (8th Cir. BAP 2006); In re Crawford, 420 B.R. 833 (Bankr. D. N.M. 2009); In re Ruckdaschel, 364 B.R. 724, 734 (Bankr. D. Idaho 2007); In re Wallace, 338 B.R. 399, 408 (Bankr. E.D. Ark. 2006). An order doing so will be entered.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court